F. M. S. R.

[APPELLATE CIVIL JURISDICTION]

MUDIE, J.

July 12, 1934.

KUTAI BIN HAJI LATEH
DATO BAGINDARAJAH REDEK BIN KENEH
LANJONG BIN KENEH } Appellants

vs.

TAENSAH BINTI HAJI ENOH.....Respondent

[NEGRI SEMBILAN CIVIL APPEAL No. 11 of 1934]

(Appeal from decision of Collector of Land Revenue).

The Probate and Administration Enactment, 1920, section 184—Hukum Shara—*Meaning of "Suit"—Limitation Enactment, 1896, section 3.*

Proceedings before a Collector under section 184 of The Probate and Administration Enactment, 1920, come within the definition of "Suit" in section 3 of the Limitation Enactment, 1896.

Appellants in person.

Respondent in person.

Cur. Ad. Vult.

MUDIE, J.—This is an appeal from the order of the Collector of Land Revenue made under section 184 of the Probate and Administration Enactment, 1920, as amended by section 2 of the Probate and Administration (Amendment) Enactment, 1926, for the distribution of the Estate of Enoh bin Khamis deceased.

It appears that Haji Enoh died sometime in 1933 in Ulu Pilah, possessed of one third interest in E.M.R. 1499 and one fifth interest in E.M.R. 3078. He left a daughter, Taensah, the respondent, and a number of cousins, sons of his father's brothers.

The respondent claims these lands on the ground that she had advanced a sum of $400/- to her father ten years before his death, and that it was understood that she would take this property when he died in discharge of the debt.

The Collector admitted her claim and made an order transferring to her the deceased's interest in the said lands.

Three of the deceased's cousins prefer this appeal against the order of the Collector on the ground that the claim was admitted on insufficient evidence. There is no documentary evidence to support the claim, which rests entirely on the evidence of the respondent and her relatives, all of whom are interested parties. They ask that the order of the Collector be set aside and that the property be distributed according to the *Hukum Shara*, under which they are entitled to a share.

The defence of limitation appears never to have been set up. From the definition of "Suit" in section 3 of the Limitation Enactment, 1896, there can be doubt that it extends to proceedings before the Collector under section 184 of the Probate and Administration Enactment, 1920. If that defence had been made, the respondent's claim would have been dismissed.

The appellants were not represented by counsel, and could not have been without the permission of the Collector under section 191. In these circumstances it was the duty of the Collector to inform the appellants, who were opposing the respondent's claim, that this defence was available to them.

I allowed the point to be taken on appeal, and held that the claim was statute-barred.

In his grounds of judgment the Collector says that, apart altogether from the question of debt, Taensah, the claimant, would inherit these lands under the *Adat Perpateh*, as these lands were opened up by her parents from their joint earnings, and according to the *Adat Perpateh* all such property passes to the children.

This is not Customary Land. It has not been endorsed under section 4 of the Customary Tenure Enactment, 1926, or under section 2 of the Customary Tenure Enactment, 1909. Whether non-customary land acquired by parents from their joint earnings would descend according to the *Adat* or the *Hukum Shara* was never definitely settled until the passing of the Customary Tenure (Amendment) Enactment, 1930, which amends the principal Enactment by the addition of a new section 25, which provides:

> "Nothing in this Enactment contained shall affect the distribution of the estate, not being customary estate, of any deceased person."

It is clear, therefore, that this land is governed by the *Hukum Shara*.

The appeal will be allowed. The order of the Collector will be set aside. There will be an order that the claim in respect of the debt of $400/- be rejected, and the land distributed according to the *Hukum Shara*.

There will be no order as to costs.

Appeal allowed.

[ORIGINAL CIVIL JURISDICTION]

THOMAS, C.J. (F.M.S.)

July 16, 1934.

ING CHIAT..... Appellant

vs.

A. B. NICHOLAS..... Respondent

[SELANGOR MAGISTRATES' CIVIL APPEAL No. 17 of 1934]

The Civil Procedure Code, 1918, sections 280 and 504—Malicious attachment before judgment —Withdrawal of application for damages under section 504—Suit for damages—Necessity of proving favourable termination of proceedings.

Where an objection to an order of attachment before judgment has been withdrawn on the understanding that the party objecting may institute a suit to establish his rights, then in a subsequent suit for damages for malicious attachment, the Court is entitled to go into the circumstances under which the order was obtained, and, where the circumstances or merits are in favour of the plaintiff, to treat the order as though it had been discharged in his favour.

A. J. Bostock-Hill for the appellant.

S. M. Sharma for the respondent.

Cur. Adv. Vult.

THOMAS, C.J.—This is an appeal from the judgment of the Magistrate of Kajang awarding the sum of $500.00 damages to the present respondent. The case is of an unusual character, and has been described by the learned magistrate as analogous to a suit for malicious prosecution.

The facts are that A. B. Nicholas, an employee of the Rinching Estate at a monthly salary of $100.00, was indebted to Ing Chiat the appellant in a sum of about $113.99 in respect of goods which had been sold and delivered. A suit was brought to recover this amount. Prior to judgment being obtained the appellant applied for attachment before judgment. This application was supported by an affidavit which stated:—

> "I understand that the Manager of Rinching Estate, Semenyih, has given notice to the defendant to terminate his service at the end of this month. I have learned from reliable source that the defendant is about to leave the jurisdiction of this Court to return to Penang without settling the money due to me and I believe the same to be true as the defendant came from Penang."

Such an affidavit is vague in its terms, and a Magistrate should not make an order, even if it were not contested, without requiring the deponent to state his means of knowledge. Presumably it would be preferable that the persons having a knowledge of the matters should themselves make affidavits.

On the application is an enfacement 'Order to issue as prayed.' On the 29th of March, 1934, an order was addressed to the Manager of the Rinching Estate, Semenyih, as follows:—

> "It is ordered that the defendant, Nicholas, be and he is hereby prohibited and restrained until the further order of this Court from receiving from the Manager of the Rinching Estate, Semenyih, the money in the latter's hands due to the said defendant, to the extent of $126.00, and that the said manager of Rinching Estate, Semenyih, be and is hereby prohibited and restrained until the further order of this Court from making payment of the said sum of $126.00."

A copy of that order was served on the manager of the Rinching Estate on the 1st of April, 1934.

On the 4th of April, 1934, the respondent swore an affidavit in which he stated:—

> "The plaintiff has attached the whole salary due to defendant on the grounds that I will leave the jurisdiction of this Court as alleged by the plaintiff. The defendant is not under notice to leave the service. The plaintiff has filed a false affidavit. The defendant therefore asks the Court to release the attachment immediately, as the defendant has a family of nine children and the dependents will have to starve if the money is held further. The defendant is owning a car which will be placed at the disposal of the Court as security for the claim and costs."

On the original of that affidavit the words "release the attachment" were written and struck out. Below are the words "notice to issue." These words are signed by the Magistrate but are not dated. It is not clear whether a fresh notice was sent to the Manager of the Rinching Estate.

A letter of the 5th of April from the employer at the Rinching Estate to the respondent says:—

> "Your April salary up to and including the 5th instant will be paid into the Court of the Magistrate, Ulu Langat, in accordance with the attachment order recently served upon me on behalf of Sin Jiat Hin & Co. of Semenyih. The balance of your March Salary (dollars sixty) was paid into the Court on the 4th instant for Sin Jiat Hin and Co."

On the 11th of April the respondent swore an affidavit the last paragraph of which reads as follows:—

> "The defendant prays he may be given damages under section 504 of the Civil Procedure Code."

That is a reference to a section of the Code which provides a speedy remedy in cases where there has been an arrest or attachment before judgment.

The application was withdrawn. There is a reference to it in the grounds of the Magistrate's judgment:—

> "Mr. Bostock Hill raised two points. His point was that the objection by the plaintiff (i.e. defendant in Civil Suit No. 34/34) to the attachment before judgment under section 279 having been withdrawn, the suit could not lie by virtue of section 280 (vi) of the Civil Procedure Code, and it was alleged by him the withdrawal was not with the permission of the Court. I have pointed out to him that the claim was withdrawn by the plaintiff at my suggestion, and permission was given by me to file a fresh suit in view of a recent amend-

ment to section 280 of the Civil Procedure Code."

Section 280 is one of the sections in that part of the Civil Procedure Code dealing with the investigation of claims and objections. These proceedings are generally known as objection proceedings. There seems to have been a confusion between such proceedings and an application made under section 504. Possibly on account of the suggestion of the Magistrate the respondent withdrew the proceedings which he had instituted under section 504, with a view of starting on a suit which is much less easy in its nature.

On the 11th of April, 1934, judgment for $113.99 was given in respect of the suit No. 34/34 in favour of the appellant, and on the 11th of April, 1934, the appellant prayed

> "for the executing of the said decree by the payment to me of the sum of sixty dollars which has been attached before judgment at my instance, and is now lying on deposit in this Court."

and stated that

> "the defendant has withdrawn his objection to the attachment before judgment."

And on the Magistrate's file appears a note dated the 11th of April, 1934, and signed by the respondent "I withdrew my objection to the attachment before judgment in this suit."

Now it is clear from the statements which I have set out that the respondent disputed the appellant's right to obtain an order for attachment before judgment. He had sworn an affidavit stating that the facts contained in the appellant's affidavit were false. He further had made an application for damages in respect of the attachment order. He had withdrawn his application, and seemingly also his objection at the suggestion of the Magistrate, through a misconception of the application and a confusion of it with the proceedings provided for by section 279 *et seq.* on the part of the Magistrate.

Then the respondent brought the suit in respect of which the present appeal is made.

In the plaint the facts are briefly set out. At the hearing before the Magistrate it was agreed that the suit did lie and was analogous to a suit for malicious prosecution. The magistrate decided that the present appellant did not have reasonable and probable cause for making the application for attachment prior to judgment. From that absence of reasonable and probable cause he inferred malice. He awarded the respondent $500 damages.

In dealing with the grounds of appeal I would say first of all that I see no adequate reason for disagreeing with the findings as to facts or for not accepting the Magistrate's opinion as to the credibility or otherwise of the witnesses.

The appellant obtained an order for attachment before judgment on the strength of an affidavit which contained statements which the slightest enquiry would have shown to be untrue and unsustainable, or, as the Magistrate expressed it, "persuaded the Magistrate to grant him the warrant of execution on false affidavit."

It has been urged that the order has not been discharged. The reason had nothing to do with the merits of the application. There was a confusion as to the procedure. Section 280 of the Civil Procedure Code has been recently amended, and sub-section (iv) provides that

> "If both parties do not consent to the matter being disposed of as provided in subsection (ii) the Court shall refuse to make any order on the merits of the application, but either party may institute a suit to establish the right which he claims to the property attached."

It was on this understanding that the objection was withdrawn. It has been suggested that the withdrawal of the objection was as a result of a settlement having been arrived at. The Magistrate has said that he does not believe that any settlement of the claim took place.

There can be no question that if the Magistrate had gone into the matter on the respondent's application, he would have set aside the order for attachment on the merits. The same Magistrate has throughout dealt with the whole of the proceedings. The arrangement would seem to have been that the question whether the order should have been set aside was to be determined at the trial of the suit. The Magistrate's findings on this issue was clearly in favour of the respondent.

In view of this it seems hardly necessary to go into the question of whether there was a discharge of the order prior to the suit. In the case of *Nicholas* v. *Sivarama Iyer*, I.L.R. (1922) 45 Mad. 527, it was held that as the defendants themselves had caused the further proceedings in the suit to be dropped, it was not necessary for the plaintiff to show that those proceedings ended in his favour.

In *Gilding* v. *Eyre & another*, 142 E.R. 584, it was objected

> "that after payment under compulsion of legal process of the money to recover which the writ of *capias ad satisfaciendum* in the former action was issued and indorsed, the new plaintiff is not entitled to maintain this action so long as the process complained of remains in force."

and

> "that the new plaintiff's proper remedy would have been to have applied in the former action to set aside the suit and execution, and for a rule or order for the new plaintiff's discharge from custody, or for the repayment of the alleged excess; and that, having failed to take that course the former proceedings are

conclusive as to the existence of probable cause."

It was held on demurrer, "that the declaration of the plaintiff disclosed a good cause of action, and that it was not necessary for the plaintiff to allege that he had obtained his discharge by order of the Court or a Judge, so as to show that the proceedings had terminated in his favour."

In *Steward* v. *Gromett*, 141 E.R. 788, the head note is as follows:—

> "In an action for maliciously and without reasonable or probable cause going before a Magistrate and procuring the plaintiff to be held to bail to keep the peace it is not necessary—as in the ordinary case of an action for a malicious prosecution—to aver that the proceeding before the Magistrate was determined in favour of the plaintiff; such a proceeding being *ex parte*, and the truth of the statement made by the applicant to the magistrate not being controvertible."

In the case of *Lees* v. *Patterson*, (1878) 7 Ch.D. 866, Fry, J., said:—

> "The writs of *ne exeat* were granted upon affidavits which satisfied the Court of the propriety of granting them, and Patterson has submitted to them instead of moving to discharge them. I must therefore take it that the writs were properly issued. Even on the merits I am disposed to think that they were properly issued."

In that last case there were no merits in favour of the application. From all these cases I conclude that the Court dealing with the sub sequent suit is entitled to go into the circumstances under which the order was obtained, and where the circumstances or the merits are in favour of the plaintiff, to treat the order as though it had been discharged in his favour.

Apart from any such power of the Court I am satisfied that that was the understanding between all the parties with the concurrence of the Magistrate in this case. The Magistrate has held that there was a want of reasonable and probable cause. I see no reason to disagree with his finding in this respect.

The Magistrate has found that the defendant (appellant) was not actuated by spite or ill will against the plaintiff (respondent). He goes on to deal with the application and then says:—

> "According to the finding in *Nanjappa Chettiar* v. *Ganapathi Gounden*, I.L.R. (1912) 35 Mad. 598, these circumstances are sufficient proof of malice and in the absence of reasonable and probable cause I therefore give judgment for the plaintiff."

Reference is made therein to *Hicks* v. *Faulkner*, (1878) 8 Q.B.D. 167, and *Quartz Hill Gold Mining Co.* v. *Eyre*, 11 Q.B.D. 674. In the former at page 175 Huddleston, B. and Hawkins, J., said:—

> "The malice necessary to be established is not even malice in law such as may be assumed from the intentional doing of a wrongful act, but malice in fact—*malus animus*—indicating that the party was actuated either by spite or ill-will towards an individual, or by indirect or improper motives, though these may be wholly unconnected with any uncharitable feeling towards anybody."

In the latter at page 687 Brett, M. R., said:—

> "It was necessary that the plaintiffs should give evidence also that the defendant had acted maliciously. Whenever in an action for malicious prosecution the Judge holds that there was a want of reasonable and probable cause, there is evidence of malice to go to the jury of malice. When there is no other evidence of malice except what the Judge has stated to be in his opinion a want of reasonable or probable cause, I incline to agree with Huddleston, B. and Hawkins, J., in *Hicks* v. *Faulkner*, that upon the question of of malice the jury are not bound by the holding of the Judge as to the absence of reasonable cause, but they may consider whether in their own view there was a want of reasonable or probable cause. But the plaintiffs might have relied upon other facts, and it appears probable that the defendant in presenting the petition to wind up the Company was actuated not by a desire to benefit the shareholders, but by an indirect motive, namely, a wish to get back the money paid by him for the shares. This would be evidence to go to the Jury. The defendant might have met it in various modes; nevertheless there was evidence of malice to be considered by the jury, even if it consisted only of want of reasonable and probable cause."

In the present case there was in addition a wish to recover the money quickly instead of an order for the payment of a few dollars monthly.

The learned Magistrate has considered this possibility and dealt with it in his judgment. I am of the opinion that the learned Magistrate was right in the conclusion at which he arrived. There remains the question of the amount of damages. I have considered the cases referred to in *Maynes'* Treatise on Damages, 9th editiion Chapter XXI. I do not consider it necessary to deal with this question at length. I have come to the conclusion that the damages are not excessive. Therefore the appeal must be dismissed with costs.

Appeal dismissed.